

**APPLICANT NO. \_\_\_\_\_**  
**ARKANSAS BAR EXAMINATION**  
**FEBRUARY, 2010**

**CRIMINAL LAW & PROCEDURE**

2 pages

The police received a request in the early morning hours of December 26, 2006, from Vaughn's wife, who was then out-of-state, to check on Vaughn because he had threatened to hurt himself. She indicated that Vaughn's brother was checking on him but she hadn't been able to reach the brother. Officer Scott and Officer Stewart were dispatched and when they arrived, Vaughn opened the door. Officer Scott asked if they could come inside because it was snowing and both she and Officer Stewart had severe head colds. Vaughn agreed. They noticed that Vaughn had no physical injuries. They also noticed pictures of a female and two twin girls on the walls. After talking with Vaughn, he agreed to be transported by ambulance for a mental evaluation.

When the ambulance arrived, Officer Scott asked Vaughn for his keys so she could lock his apartment. As she turned to lock the door, she noticed a pool of blood by a closet in the back of the apartment. As she got closer, she saw a decaying body. Officer Stewart had already taken Vaughn downstairs and helped him into the ambulance. Officer Stewart was unaware of Officer Scott's discovery. Officer Scott immediately came down to the ambulance and read Vaughn his Miranda rights. Vaughn admitted to the police that he killed his brother. The physical evidence the police collected at the apartment indicated that the murder had occurred some three or four days earlier.

Vaughn's wife gave a sworn, videotaped statement to the police in which she testified about Vaughn's jealousy. She indicated that it had gotten to the point that he had accused her of having an affair with his brother.

Vaughn was charged by felony information with capital murder. After a jury was selected and sworn, both sides presented opening statements. At the conclusion of Vaughn's attorney's opening statement, the State moved for a mistrial based on comments made by Vaughn's attorney during opening statement that amounted to a change in defense theories from one of self-defense to one that the death was accidental. The trial court granted the State's motion for mistrial over Vaughn's attorney's objection and discharged the jury.

The trial court then reset the case for jury trial. Vaughn's attorney immediately objected and argued that the State was now barred from trying the case. Vaughn's attorney asked that the case be dismissed.

How should the trial court rule on Vaughn's attorney's motion to dismiss? (For the purposes of this question, assume that a written motion is not required.)

Vaughn's attorney also argues that the physical evidence collected by the police should be suppressed. How should the trial court rule on this motion?

At the trial, the State intended to introduce Vaughn's wife's statement. They were not going to call her because she was not available for trial and they wanted to avoid any issues that might be raised by the marital privilege. Is there a constitutional basis for excluding this tape?

**4) Please type your answer to Criminal Law and Procedure below**  
(Essay)

Criminal Law and Procedure

1. Motion to Dismiss

The trial court should overrule the motion to dismiss. At issue is whether resetting the case for another trial after the first trial ended in a mistrial amounts to double jeopardy. The Double Jeopardy Clause of the Constitution, as applied to the states by the Due Process Clause of the Fourteenth Amendment, prohibits a state from trying a defendant twice for the same offense. In a trial by jury, jeopardy attaches when the jury is sworn in. Thus, once the jury is sworn in, the defendant may not be retried for the same offense absent a finding of manifest necessity. Manifest necessity has been found to include such situations where a mistrial is declared so long as the mistrial was not caused by the prosecution.

In this case, Vaughn was charged with capital murder and a jury was sworn in for trial. Jeopardy attached at the swearing in of the jury. A mistrial was declared and Vaughn has been charged again with capital murder for the same offense. Thus, unless the granting of the mistrial was a manifest necessity, double jeopardy would bar placing Vaughn in further jeopardy for the same offense. The facts indicate that Vaughn's counsel made comments during the opening statement indicating a change in defense theory from self-defense to an accidental death. It is not clear from the facts as to whether the change in defense theory was actually made during the opening statement, that is that counsel presented one theory at first then another later in the statement, or whether the theory had changed from what the prosecutor believed the theory to be prior to trial. The prosecution moved for a mistrial based on such

comments and the judge agreed. Assuming the comments made during opening statement were proper grounds for a mistrial, then granting of the mistrial would be a manifest necessity and double jeopardy would not be implicated. If, however, it were determined that such statements were not improper, then there would be no manifest necessity for a mistrial and double jeopardy would bar the second trial, requiring the court to sustain the motion to dismiss.

## 2. Suppression of Physical Evidence

The physical evidence should not be suppressed. The Fourth Amendment to the Constitution, as applied to the states by the Due Process Clause of the Fourteenth Amendment, prohibits unreasonable searches and seizures. Evidence obtained or derived from a violation of the Fourth Amendment must be excluded under the fruit of the poisonous tree doctrine. Generally, a search warrant is required for a search to be valid. A warrant must be supported by probable cause, issued by a neutral and detached magistrate, and must provide a particular description of the place to be searched and the things to be seized. There are, however, numerous exceptions to the warrant requirement, including searches incident to a lawful arrest, searches based on consent, the plain view doctrine, the automobile exception, "Terry" stops, etc. Three exceptions are most relevant to the facts of this case, as discussed below.

In this case, police responded to wife's request to check on Vaughn by driving to Vaughn's house and knocking on the door. Based on the wife's request, the police had a lawful right to knock on Vaughn's door and ask questions to check on him. The police did not, however, obtain a warrant to search Vaughn's house. The Fourth Amendment protects searches of the home such that a warrant must be obtained unless an exception applies. When Vaughn opened the door, the police asked if they could enter his house. Vaughn

agreed. When the police entered Vaughn's house, such conducted amounted to a "search" under the Fourth Amendment as an intrusion into a reasonable expectation of privacy, which one has in one's home. However, no warrant was required because Vaughn provided consent. It is not relevant that the police mentioned the weather and/or illnesses to gain consent. Consent is generally valid so long as it is not obtained by a show of force. Once inside the house, the plain view doctrine makes any evidence in plain view admissible. Under the the plain view doctrine, so long as an officer is in a place he or she is legally entitled to be, all evidence in plain view is admissible because there is no expectation of privacy in such items left in plain view. Here, the officers were invited in and thus were in a place they were legally entitled to be. Officer Scott observed the pool of blood that was in plain view after Vaughn provided his keys so she could lock the door, which is further evidence of consent for the officer's vantage point. Once Officer Scott viewed the blood, the exigent circumstance to the warrant requirement allowed her to furthe enter the house to determine if someone was in need of medical aid. At this point the body was uncovered. All of the physical evidence is therefore admissible.

Vaughn might argue that he could not provide the knowing, voluntary and intelligent consent necessary to override the warrant requirement for the police to enter his house. If a court were to agree, the physical evidence would be excludable as fruit of the illegal search. However, although Vaughn was having mental problems at the time of his consent, as shown by the threats to hurt himself, there is nothing to suggest that he was in such an incapacitated condition as to be unable to provide consent. Thus, this argument would likely fail and the court would not suppress the evidence.

### 3. Exclusion of Wife's Statement

The trial court could exclude the tape based on the Confrontation Clause. The Confrontation Clause of the Constitution, as applied to the states by the Due Process Clause of the Fourteenth Amendment, generally prohibits the use of evidence in a criminal case unless the defendant has an opportunity for cross examination. In this case, Vaughn's wife has provided testimonial evidence by way of a sworn videotaped statement made to police discussing Vaughn's alleged jealousy. Vaughn was not present nor was his counsel at the taping of the statement. Nor is the wife going to be produced at trial. Thus, Vaughn has not had any opportunity to cross examine the wife and will not be afforded one at trial. The court should therefore exclude the statement as a violation of the Confrontation Clause.

**END OF EXAM**

**APPLICANT NO. \_\_\_\_\_**  
**ARKANSAS BAR EXAMINATION**  
**FEBRUARY, 2010**

**PROPERTY**

1 page

Ed inherited a nice fruit and vegetable farm from his mother in 1993. In 1995, Annie bought the 2 acre piece of undeveloped commercial property adjoining Ed's farm from an out of state investor. The quitclaim deed Annie obtained when she purchased it made no mention of the dirt road across it, which supplied the only access to Ed's farm. It had been used by Ed and his family for years without permission.

In 2002, Ed sold his farm to Annie, also by quitclaim deed, which was properly recorded. As soon as she bought the farm, Annie deeded it to her son, Bo, who lived in California, by executing and recording a quitclaim deed to him. In the deed she reserved a life estate for herself. This deed also made no mention of the dirt road.

Also in 2002, and without Bo's knowledge, Annie entered into a written lease of the farm to Lad, for a five year term with no mention of any right of renewal. The lease was not recorded. Lad took possession of the land, has made substantial improvements on it and continues to actively farm it in 2010. He and Annie did not have any written extension of the lease, but she received annual rent each year on June 1.

In 2008 Annie sold the two acre commercial tract she had bought in 1995 to DevCo., which intended to build a strip mall on it. The general warranty deed containing the words "grant, bargain and sell" from Annie was recorded. It made no mention of the dirt road.

Annie died in January 2010. Bo returned from California and learned for the first time that Lad had the farm leased. He has told Lad he is a trespasser and must vacate the farm immediately. DevCo is ready to start construction of the mall. It has erected a barricade to keep Lad from using the road, which is located in the footprint of the planned mall. Lad's strawberry crop will be ready to pick in 6 weeks.

Question One: While he owned the farm, did Ed have a property right in the use of the road? Explain.

Question Two: Does Lad have a property right in the use of the road? Explain.

Question Three: What right, if any, does DevCo have to close the road? Explain.

Question Four: Advise Bo on his most prudent course of action, listing not more than 3 options he might consider.

**2) Please type your answer to Property below**

**When finished with this question, click the blue arrow button above to advance to the next question. (Essay)**

1. **Ed's Rights in the Dirt Road:** While Ed owned the farm, he had an appurtenant easement to use the land. An appurtenant easement is a non-possessory interest in the real property of another (the "servient estate") which benefits the owner of the "dominant estate" (the estate benefited by the easement). An appurtenant easement may be created expressly by language in the granting instrument, may be implied if it is absolutely necessary to use or access the dominant estate, or can be obtained through prescription, which is analogous to adverse possession. Here, the dirt road was not mentioned in the deed granting the land to Annie, so it was not an express easement. However, if it was mentioned in deeds of the prior owners then the express easement would continue in favor of Ed's property even though it was not expressly mentioned in Annie's deed. The right to use the dirt road may be implied in this situation, because the facts state that it was the only access to Ed's farm. If there was no other way to reach the farm, then the easement to use the dirt road would be absolutely necessary -- Ed could go to court in Arkansas and force Annie to convey an easement to him. Finally, Ed likely obtained an easement on the road through prescription. The elements of prescription in Arkansas are open and notorious use of the property of another, continuous for seven years, without permission of the owner of the property. The facts state that Ed and his family had used the dirt road for years without permission -- Ed may be able to tack on his predecessor's use of the road in order to meet the seven year requirement, so long as the use was continuous. Ed's use of the property may be considered open and notorious even if Annie does not have actual knowledge of the use, as long as it was clearly visible.



**2. Lad's Rights in the Dirt Road:** Lad may have a right to use the dirt road. Though in general, once an easement is created its benefit passes to subsequent owners of the dominant estate, Lad cannot assert the easement created by Ed (above) because that easement was terminated through unity of ownership. Once the dominant and servient estates are owned by the same party, the easement is terminated and is not revived merely by reselling the dominant estate. Annie leased the farm to Lad in 2002 for a period of five years, though she continues to receive annual rent checks even in 2010. After the original term of the lease had ended, Lad became a tenant at will until he paid rent for the following year, at which point the lease became a periodic tenancy. As a tenant, Lad has a right to use the dirt road if it is reasonably necessary to use and enjoy the premises -- as the facts state that the road is the only means of accessing the farm, Lad would have the right to use it.

If we assume that Lad last paid rent on June 1, 2009, he would normally be required to be given six months notice before the lease may be terminated. Generally with a periodic tenancy the notice of termination must be given a length of time equal to the rental period -- here, the period was one year, but for yearly terms the notice period is shortened to six months. However, he may currently be trespassing. The general rule is that a grantor cannot convey any interest in land other than that owned by the grantor at the time of the conveyance -- Annie merely had a life estate in the farm, and could not grant any interest in the farm that extended past her death. As she died in January 2010, Lad's rights may be extinguished. However, a court may, in equity, determine that the periodic tenancy was effective for the term of rent paid by Lad. Since the deed from Annie to Bo was recorded, however, a court may decide that Lad had a duty to inspect the property records to discover that Annie only had a life estate in the property she was leasing.

3. **DevCo's Right to Close the Road:** DevCo does not have a right to close the road since it was absolutely necessary to access the adjoining property. A landowner can compel an adjoining landowner to grant him an easement by necessity when the easement is absolutely necessary. Once Annie deeded the tract to DevCo, there was no longer any unity of ownership in the two estates, and an easement by necessity could arise. The owner of the servient estate may not block the use of an easement by necessity.

4. **Bo's Course of Action:** I would first advise Bo to immediately give Lad notice of termination of the lease in 6 months. As described above, after the original term of five years ended, the lease became a periodic tenancy for one-year terms, as that was when rent was paid. Though Annie could not grant any interest in the land that extended past her death, a court may in equity determine that the lease remained effective, as equity regards as done that which ought to have been done. Giving Lad 6 months notice of termination would protect Bo's ability to evict Lad if the courts did determine that the lease remained in effect after Annie's death.

Next, i would advise Bo to seek damages from Annie's estate for waste. Generally, a life tenant has a duty not to commit waste that impairs the interest of the remaindermen. Annie retained a life estate in the farm for herself, making Bo the remainderman. Waste can be ameliorative -- such as making improvements on the land as Lad did.

Finally, I would advise Bo to sue DevCo in order to have a court compel DevCo to grant him an easement to use the dirt road. In Arkansas, an adjoining landowner can force his neighbor to convey an easement which is absolutely necessary to use and enjoy the property. The dirt road is the only means of accessing the farm, and DevCo has improperly blocked the

road. Getting a court order would clarify the parties' rights and would protect Bo's interest in the road. If the road is currently in the footprint of the planned development, the court may order that another easement be granted which would allow Bo to access the farm.

**END OF EXAM**

**APPLICANT NO. \_\_\_\_\_**  
**ARKANSAS STATE BAR EXAMINATION**  
**FEBRUARY, 2010**

**TORTS**

1 page

On January 5, 2008, Dr. Ann Adams was shopping at the perfume counter at the Campbell Department Store ("CDS"). Tina Jones, an employee of CDS, saw Dr. Adams place a bottle of Chanel No. 5 perfume into her purse. Tina alerted the security guard, Kevin O'Malley, who approached Dr. Adams on suspicion of shoplifting.

She loudly protested her innocence and threatened repeatedly to sue CDS. Mr. O'Malley is an off-duty policeman with many years of training and experience. He then forcefully took Dr. Adams by the arm and escorted her through the crowded store to the security office. The scene was witnessed by a number of patrons in the store, including Betty Tellall, wife of the local hospital administrator where Dr. Adams works. Ms. Tellall managed to take a picture on her cell phone of Dr. Adams as she was led away by Mr. O'Malley and later provided a copy of it to the local Gazette. The next morning the front page of the paper included the photograph of Dr. Adams with the headline "Local Doctor Shoplifts as Second Job."

Once in the security office, Dr. Adams' purse was searched and the bottle of Chanel No. 5 found inside. She claimed it was one she had brought from home to compare scents. It was partially used. Dr. Adams was detained in the security room for a period of three hours and repeatedly questioned by the security officer and the store manager about the situation. CDS decided to prosecute Dr. Adams, despite her protestation of innocence. She hired an attorney to defend her on the criminal charges and consider any civil action she may have against others.

In the State of Arkansas, there is the following statute, Ark. Stat. Anno. 5-36-102 "Shoplifting Presumption", that includes the following:

- (c) The knowing concealment, upon an actor's person or the person of another, of an unpurchased good or merchandise offered for sale by any store or other business establishment, gives rise to a presumption that the actor took the good or merchandise with the purpose of depriving the owner or another person having an interest in the good or merchandise.

On the date her criminal case was scheduled to be tried, no witness for CDS appeared and all charges were dropped. Following the arrest, Dr. Adams saw her friend Dr. Smith for treatment of anxiety, nightmares and was prescribed Xanax as an anti-anxiety medication. Dr. Adams also missed a week of work following her arrest. Several of her patients called and canceled their appointments in the month following her arrest.

Basing your answer on the facts provided and with reasonable inferences that can be made, please describe and discuss the following:

1. At least two (2) possible causes of action Dr. Adams may assert against CDS, what is required to prove each such cause of action and what elements of damage are recoverable;
2. Discuss the prospects for recovery by Dr. Adams on each such cause of action; and,
3. Are there any claims Dr. Adams could assert against any other party and, if so, describe and discuss one such possible cause of action, its elements, damages recoverable, and likelihood of success if asserted by Dr. Adams?

**1) Please type your answer to Torts below**

**When finished with this question, click the blue arrow button above to advance to the next question. (Essay)**

1. Dr. Adams has the following two possible causes of action against CDS: (1) Intentional infliction of emotional distress ("IIED"), and (2) False imprisonment.

**IIED**

In Arkansas, to prove a prima facie case for IIED, a plaintiff must prove the following elements: (1) An intent by the defendant to create emotional distress or anxiety in the mind of the plaintiff, (2) That the plaintiff suffered severe emotional distress or anxiety, (3) The defendant's actions were the cause of the plaintiff's distress or anxiety, and (4) Damages suffered by the plaintiff. An IIED plaintiff in Arkansas must have damages that exceed just some emotional distress; the plaintiff's distress must be severe. In order to recover, the plaintiff must also show actual damages done. A plaintiff will not recover merely because she suffered anxiety; there needs to be some level of actual harm done to a plaintiff in order to recover for IIED in Arkansas. The elements of damage recoverable include actual physical or pecuniary harm done to the plaintiff based on the anxiety suffered from the IIED, such as nightmares, clinical depression, loss of sleep or appetite, and, in some cases, lost wages from inability to work or other lost profits.

**False imprisonment**

To prove a prima facie case for false imprisonment in Arkansas, a plaintiff must prove the following elements: (1) An unlawful detention of the plaintiff by the defendant in an enclosed space, (2) The defendant intended to confine plaintiff in the enclosed space, (3) Plaintiff was

aware of the confinement, and (4) Plaintiff suffered damages therefrom. The space in which plaintiff is confined must be fully enclosed in such a manner that deprives the plaintiff of the ability to reasonably escape or voluntarily leave the premises. The plaintiff need not suffer actual damages; the mere confinement meeting all of the aforementioned elements is enough for recovery in Arkansas. The amount of time required for a false imprisonment in Arkansas is minimal. In Arkansas, there are additional rules pertaining to detention by shopkeepers with respect to those suspected of shoplifting. When an individual is suspected of shoplifting, the shopkeeper is allowed to detain the suspect for a short amount of time in order to determine if the shoplifting actually occurred. It is important to note that the shopkeeper does not have unbridled discretion to detain the alleged shoplifter and must not detain them for more than a very short amount of time. What is considered a short amount of time is a factual question, but Arkansas case law has supported the opinion that more than half an hour to one hour is too long of a time period. Additionally, a shopkeeper may not use force in detaining an alleged shoplifter.

2.

### IIED

Dr. Adams may recover against CDS for IIED. In order to prove her case, Dr. Adams will have to prove that CDS intended to cause severe emotional distress in her mind. This element may be hard for Dr. Adams to prove because the facts do not indicate that CDS intended to cause her emotional distress or anxiety. The facts show that the emotional distress and anxiety caused by CDS was the result of their intention to determine if she was shoplifting, and it was not with the intention to cause her harm. However, Dr. Adams may be able to prove that CDS acted unreasonably in relying on Jones' allegation that Dr. Adams was shoplifting or that Jones

was fabricating the truth in order to cause anxiety to Dr. Adams. If she can prove either of these, it will be enough to satisfy the intent requirement of IIED. Once Dr. Adams established intent, she can easily establish the other elements. Dr. Adams suffered severe emotional distress because of CDS's actions and consequently suffered damages. Her damages exceeded more than just mere emotional distress; she also suffered from nightmares and was forced to see a doctor for treatment of anxiety. Dr. Adams was prescribed anti-anxiety medication as the result of defendant's actions and also suffered lost profits from her inability to attend work and her loss in patients. Therefore, as long as Dr. Adams can satisfy the first element of IIED, intent, she can recover against CDS.

### **False imprisonment**

Dr. Adams has a high prospect of recovery against CDS for false imprisonment. The shopkeeper laws in Arkansas allowed CDS to detain Dr. Adams for a reasonable amount of time. However, she was detained for three hours without the ability to voluntarily leave the premises, which is unreasonable. As such, her detention by CDS became unlawful. Secondly, CDS intended to confine Dr. Adams in the enclosed space in order to question her about the alleged shoplifting. Third, Dr. Adams was aware of the confinement. Finally, Dr. Adams suffered damages from her mere confinement. She need not prove any other element in order to satisfy the damages element. Therefore, Dr. Adams has a prima facie case against CDS for false imprisonment.

3. Dr. Adams could assert a defamation action against the local Gazette. In order for a private citizen to recover for defamation in Arkansas, she must show the following elements: (1)

That the defendant made a false statement regarding the plaintiff, (2) The false statement was published, (3) The defendant published the statement knowing it was false or with reckless disregard as to its truth, and (4) Plaintiff suffered actual damages as a result. Arkansas differs slightly from common law in that the plaintiff must show more than mere injury to her reputation. She must show some sort of calculable damages and can recover money damages, including lost profits. Here, the Gazette made a false statement regarding Dr. Adams when it stated that she "shoplifts as a second job." Whether Dr. Adams was shoplifting or not was unknown by the Gazette, and the statement and picture placed her in a false light. At the very least, the statement's truth has not been proven. Secondly, the false statement was published because it was printed on the front page of a newspaper of general circulation. Third, the Gazette published the statement with reckless disregard as to its truth, as the facts do not indicate that it knew or tried to learn of the truthfulness of the statement it printed. Finally, Dr. Adams suffered actual damages as a result of the Gazette's statement that exceeded just her loss in reputation. Following her arrest, several of her patients cancelled their appointments. Because arrests are not general knowledge, their cancellations may be presumably caused by the Gazette's article. As such, Dr. Adams suffered damages as a result. Therefore, Dr. Adams has a high likelihood of success if she asserts a defamation action against the local Gazette.

**END OF EXAM**



**APPLICANT NO. \_\_\_\_\_**  
**ARKANSAS STATE BAR EXAMINATION**  
**FEBRUARY, 2010**

**WILLS, ESTATES & TRUSTS**

2 pages

In 2008, Lovie and Thurston are having marital trouble. Thurston is having an affair with Mary Ann. In order to placate Lovie, Thurston adopts her child (Skip) from a previous marriage (which he keeps secret from Mary Ann). Further, Thurston prepares a holographic Will giving one third of his property to Lovie, one third to Skip, and one third to Roy (Thurston's only other child).

In late 2009, Thurston's affair with Mary Ann intensifies. Mary Ann is going to leave him unless some life changes are made. In December 2009, Thurston orders a Will kit from Legalzip.com. He fills in the blanks, with his own handwriting, contained in the preprinted Will form. He signs and dates the will in front of Gilligan, a long time friend. Ten minutes after Thurston signs the Will, Mary Ann comes to Thurston's mansion. Thurston tells Mary Ann that he has just signed his new Will minutes ago, and shows it to her. In each other's presence, Gilligan and Mary Ann sign the blanks for witnesses on the Will form. The Will is not notarized. The will makes no mention of his only adopted son, Skip.

The December 2009 Will contains the following provisions:

- 1) To my wife, Lovie, should she survive me, I give, devise and bequeath all my real estate.
- 2) To Mary Ann, should she survive me, I give, devise and bequeath all my interest in my CD's in Arvest Bank.
- 3) To Gilligan, if he should survive me, I give, devise and bequeath my yacht, "The SS Minnow".
- 4) To the World War I Veteran Relief Fund, Inc. I give devise and bequeath the sum of \$1,000,000.00.
- 5) I give devise and bequeath the rest and residue of my estate to my son, Roy, or unto his descendents, per stirpes.

In January, 2010, Lovie is finally fed up with Thurston's affair, and insists on a divorce. Thurston capitulates, and their uncontested divorce decree is entered in February 2010. As part of the divorce settlement agreement, Thurston adds Skip as "p.o.d." (payable on death) on his CD's at Arvest Bank. He made no such change on his solely owned secret savings account at Bank of the Ozarks, containing \$2,000,000.00. Thurston's real estate is valued at \$2,000,000.00.

The World War I Veteran Relief Fund, Inc. Is a charitable entity. January 2010 the last living veteran of World War I dies.

Thurston mysteriously dies in April, 2010, soon after Mary Ann catches him at Ginger's apartment early one morning.

#### QUESTION 1:

Which, if either, is the valid Will? Explain why.

#### QUESTION 2:

What interest, if any, do the following have in Thurston's estate/property. (Explain your answers)

- A) Skip;
- B) Lovie;
- C) Mary Ann;
- D) Gilligan;
- E) Roy;
- F) World War I Veteran Relief Fund, Inc.; and
- G) Any other person or entity.

**3) Please type your answer to Wills, Estates, Trusts below**

**When finished with this question, click the blue arrow button above to advance to the next question.**

*(Essay)*

**ARKANSAS WILLS, TRUSTS & ESTATES****1. WHICH WILL IS VALID.**

The 2009 will is a valid attested will.

First, the 2009 will revoked the 2008 holographic will. A will may be revoked by a subsequent writing or an act made by the testator who intends to revoke the will.

Next, the 2009 will is an attested will. An attested will in Arkansas requires the testator have testamentary capacity and sign a writing in the presence of two witnesses to the will and the publication of the will by the testator. There is no requirement that the will be notarized.

Thurston has testamentary capacity. In Arkansas, a testator must be at least 18 years old and have the capacity to understand the nature and objects of his estate, the natural objects of his bounty, and the nature of the testamentary act. Thurston is presumably 18 years old, he understand the nature and extent of the objects of his estate, he understands those natural objects of his bounty and the nature of the testamentary act.

There is a signed writing. Thurston filled in the blanks with his own handwriting and signed the

will.

There were two witnesses. The witnesses need to see the testator sign the document. However, a witness who is close in time and place to the signature and understands that the signature is one that is made to create a will may be a valid witness. Here, Testator signs and dates the will in front of Gillian (Witness1) and ten minutes later tells Mary Ann (Witness 2) that he has just signed his new Will minutes ago, and shows it to her. In each other's presense, Gilligan and Mary Ann sign the blanks for Witnesses on teh will. Here, because one witness saw the act of the testator signing and the other new of the act and was given sufficient notice of the testamentary act the witness requirement will be met.

Finally, the will was published by the testatory. Thurston stated to the witnesses that he signed a new will and signed the will in the presence of one witness. Publication merely requires the statement of the will being the last will and testament of the testator.

## **2. WHAT INTERESTS DO THE FOLLOWS PEOPLE HAVE IN THE ESTATE.**

a. SKIP: Has an interest in the CD's at Arvest Bank. He may argue that he is a pretermitted child who is able to take an intestate share of the estate. A pretermitted child is one who is not mentioned in the will and is left out and not otherwise provided for. Note that the fact that Skip is adopted will not be a factor here because in Arkansas adopted children are treated just the same as natural born children. Because Skip was provided for in the divorce settlement outside the will he will probably not be able to take an intestate share as a pretermitted child. If he was able to take the intestate share, he would take 1/2 of the property becuase Thurston had 2 heirs, Skip and Roy.

b. Lovie: She has no interest the estate because of the divorce. Her gift will lapse and fall to the residue of the estate.

c. Mary Ann: Mary Ann will take nothing because she is an interested witness, the gift will lapse as it is being given to Skip outside the will as a POD account, and she may be subject to the Slayer Statutes. An interested witness forfeits their share under the will. If an interested witness is also an heir they would take whatever the lesser of their testate or intestate share would be. Mary Ann was not married to the testator so she is not an heir and forfeits her share. The gift will fall to the residue of the estate.

In addition, the facts indicate that she may have killed Thurston. Thurston mysteriously died in April, 2010 soon after Mary Ann caught him at Ginger's apartment early one morning. These facts may give rise to the Arkansas Slayer Statute which treats a person who takes a share of estate as if they predeceased the testator. These facts alone do not give rise to this issue being a problem.

d. Gilligan: Must like Mary Ann, he is an interested witness who will forfeit the right to take under the will under Arkansas law. The gift will fall to the residue of the estate.

e. Roy: He will receive the majority of the estate as it passes to the residue as provided for in the will. This includes all real and personal property owned by Thurston at death. Note that Roy will have a right of exoneration for any debts owed by his father on any real or personal property before he takes it. Also, because he takes property through a residuary gift, the claims of creditors and cost of administration will be taken out against his gift.

f. Veteran Relief Fund: The gift may lapse to the residue unless the language in the will creates a charitable testamentary trust. The language in the will lends itself to the presumption that the testator intended that a charitable trust be created in the amount of \$1million for the Wold War I Veteran Relief Fund. A trust requires the grantors intent, named beneficiaries and a res or trust corpus (the property that is the subject of the trust.) Usually there needs to be defined beneficiaries, but where the trust is created for a charitable purpose the needs to be a number of unnamed or unascertainable beneficiaries. Here, these requirements are met becuase there was intent by the grantor to make a trust gift, the beneficiaries are unascertainable and the trust corpus is \$1million.

The \$1million that is to be given to the veteran relief fund may be held in trust for another charitable purpose under the doctrine of Cy Pres. Under this doctrine, when a charitable trust is made and the purpose for which it is created has ended it's use may be changed for another similar charitable purpose. Here, because in January 2010 the last livingi veteran of World War 1 has died, the court may alter the purpose of the trust and use it for World War II veterans or veterans in general.

g. Any other person or entity: The cost of administration and any creditors claims must be paid out before the gifts in the will may be distributed.

**END OF EXAM**

**APPLICANT NO. \_\_\_\_\_**  
**ARKANSAS STATE BAR EXAMINATION**  
**FEBRUARY, 2010**

**EQUITY & DOMESTIC RELATIONS**

1 page

Husband and Wife moved back home to Arkansas two months ago. The primary reason for the move was so Husband could assume ownership of the family business he inherited from his deceased father. Twelve months earlier, husband had an affair. He confessed the affair to Wife and asked for her forgiveness. Wife agreed to attempt to do so, and the two of them attended marital counseling. In fact, they were still attending counseling before they returned to Arkansas. Wife was having a very tough time dealing with the situation and learning to trust Husband again.

Now that they are back in Arkansas, Husband, who is president of the business, is working day and night improving the value of the company and therefore unable to resume the marital counseling sessions. He promised Wife that he would return to counseling as soon as the business reached "a certain point." However, he is just unable to attend right now. Besides, they had been attending for almost ten months! So, a little break was not going to hurt them.

Meanwhile, the company's stock increased, but Husband still did not cut back on his working hours and resume the counseling sessions. Wife was very unhappy and felt that Husband might be falling into his old habits again. Late nights at work was the excuse he used the last time he committed adultery. She therefore decided to file for divorce on the grounds of adultery and sought custody of their two children, a 12-year-old daughter and a 14-year old son. Husband contested the divorce, alleging that adultery in another state was no ground for divorce in Arkansas, and that Wife had forgiven him for the earlier indiscretion. Husband also asked for custody of their son, if the court did grant a divorce. His position was that boys needed to be with men to learn how to be men. The son also stated he would rather live with Dad because Dad was "more fun" than Mom was. Mom just sat around crying all the time.

**QUESTIONS**

1. Discuss the elements that must be proved to obtain a divorce in Arkansas and whether Wife will be successful in obtaining one. Include a discussion of Husband's claims.
2. In connection with the distribution of property, is Wife entitled to any proceeds from the family business inherited by Husband? If so, under what theory?
3. Discuss the standards or factors a court considers in awarding custody and tell who is likely to get custody of Son.
4. Define the following terms and give an example of each.
  - a. Clean Hands
  - b. Equitable Estoppel
  - c. Laches

**4) Please type your answer to Equity and Domestic Relations below**  
(Essay)

**1) Elements of divorce in Arkansas and will Wife be successful. And, Husband's claims.**

In Arkansas to obtain a divorce a party has to establish residency in Arkansas, prove a ground of fault, and show that that fault ground was in existence at least five years prior to the commencement of the action.

Residency: In Arkansas a party has to have been a resident of the state for 60 days prior to the commencement of the action. Here, the facts state that Husband and Wife have lived in Arkansas for two months. In Arkansas residency is corroborated by oral testimony or affidavit. Corroboration can be shown through proof of address, showing of having paid taxes in Arkansas, or employment in Arkansas. The fact state Husband and Wife live here and Husband operates a business here (employment).

Cause of Action: to establish cause of action the parties have to state a fault ground. Fault grounds are: Felony or other heinous crime, Impotency, General Indignities, Cruelty, Habitual Drunkenness for more the one year, Lack of wilful support and Adultery. In addition the part has to show that the cause of action has been in existence for five years prior to commencement of the action.

To prove adultery a party has to show that the spouse slept with someone that was not his spouse and that he was 1) inclined to commit adultery, 2) he had the opportunity. Here, it is not disputed that Husband had an affair 12 months ago. This falls within the stipulated time for the cause of action. Adultery is an adequate cause of action for this divorce. Husband disputes this



arguing the adultery took place in another state therefore it should not register as a cause of action in Arkansas. Arkansas will recognize fault grounds that actually took place in another state if the action falls under one of the state fault grounds in Arkansas as long as all other requirements are met. Husband loses on this argument. Husband further attacks the fault ground of adultery by claiming the wife forgave his indiscretion therefore voiding her opportunity to use adultery as a fault ground. This is wrong. Husband is arguing under the theory of condonation. Condonation is a defense to fault ground divorce. Condonation reasons that if a spouse has forgiven a spouse for a fault ground (in this case forgiven previous adultery) then the fault ground cannot be later used as a basis for divorce. Husband loses on this point in Arkansas because Arkansas abolished condonation.

Wife has met the requirements for divorce and will likely be successful in gaining a divorce in Arkansas.

## **2) Is Wife entitled to proceeds from the family business**

Arkansas is a state that follows equitable distribution of marital property. This theory follows that marital property (property obtained after marriage) will basically be divided 50/50, but the distribution can vary to satisfy issues of equity. Under this theory there are two types of property the aforementioned marital property and separate property. Separate property is property that the spouse brought into the marriage and theoretically it is not subject to distribution at the time of a divorce. Examples of separate property are: gifts or bequests, appreciation of separate property, property subject to a prenuptial agreement, property traded for separate property. Here, Husband inherited the business from his father. On its face this is separate property and Wife is not entitled to it. However there are exceptions to some forms of separate property. One

being active appreciation of a business. Under active appreciation a court will take into consideration the time, skill and effort a spouse put into a business at the expense of the marriage. Any gain or profit from the business will be deemed marital property and be subject to equitable distribution at divorce. Here the facts state that Husband worked on the business day and night. He even stopped marriage counseling in an effort to increase his business. The company's stock increased. While stock options may remain separate property its increase due to active appreciation will be deemed marital property.

### 3) Child custody

When determining child custody courts will consider the best interest of the child. The best interest of the child takes into consideration the relationship the child has with his parents, psychological well being of parent, parents economic and job standing, child's education, parent's mental capacity, sex of child, age of child, interests in keeping siblings together, and in some instances the preference of the child (depends on age).

Here both parents want custody of their 14 year old son (Son). Neither parent has shown any evidence of unfitness. Even though Son alleges that Wife just sits around and cries all the time unless it can be found that there is some profound psychological dysfunction rendering her unfit to care for son, this would not be enough to be a determining factor in whether she was awarded custody. Wife would argue that it would be in Son's best interest to be with her and his sister to foster the sibling relationship. Husband would probably have to show that he would be willing to reduce work hours. Because of Son's age a court would consider his wants and Son has stated he wants to live with his father. It probably won't hold a lot of weight that the reason he wants to be with his father is because his father is more fun. Again, neither parent has

seemed to exhibit any extreme unfit characteristics. A court would consider all the circumstances under the doctrine of the best interest of the child.

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a. Clean Hands- neither party is at fault. One party is trying to sue another party and neither can find fault with the other. This is opposite of Unclean hands where both parties have some fault or the same fault. For example, plaintiff sues defendant for trees encroaching her property. Defendant counter sues because plaintiff has trees encroaching his property too.

b. Equitable Estoppel- one party allows another party to act in reliance and that party relies to their detriment. Plaintiff watches defendant plant trees that plaintiff knows will encroach her property or plaintiff allows defendant to plant the trees. Then later trees to sue to have the trees removed.

c. Laches- this is the equitable equivalent of statute of limitations. Plaintiff waits 5 years to sue defendant of trees that have been planted for same amount of time.

**END OF EXAM**